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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Petitioner,

v.

THE SUPERIOR COURT OF
SAN BERNARDINO COUNTY,

Respondent;

ANTWON DARNELLE COLBERT,

Real Party in Interest.

E057612

(Super.Ct.No. FSB1201213)

OPINION

ORIGINAL PROCEEDINGS; petition for extraordinary writ. Harold T.

Wilson, Jr., Judge. Petition granted.

Michael A. Ramos, District Attorney, and Stephanie H. Zeitlin, Deputy District Attorney, for Petitioner.

No appearance for Respondent.

Phyllis Morris, Public Defender, and Sam Knudsen, Deputy Public Defender,
for Real Party in Interest.

Petitioner seeks this writ of mandate to vacate the trial court's order for disclosure of the identity of a confidential informant. Our review of the record reveals no cognizable evidence that would support a finding that nondisclosure of the informant might deprive the defendant of a fair trial. (Evid. Code, § 1042, subd. (d).)¹ In order not to delay trial of this matter further, we issue a peremptory writ of mandate in the first instance. (Code Civ. Proc., § 1088; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178-179.)

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner (the People) have charged real party in interest Antwon Darnelle Colbert (defendant) in count 1 with possession for sale of cocaine base in violation of Health and Safety Code section 11351.5 with an allegation that the offense was committed for the benefit of a criminal street gang in violation of Penal Code section 186.22, subdivision (b)(1). Count 2 charges defendant with active participation in a criminal street gang in violation of Penal Code section 186.22, subdivision (a).

These charges arise from the execution of a search warrant that was issued based on the affidavit of Officer Shank of the San Bernardino Police Department. In turn, Officer Shank relied on information supplied by a confidential informant to make the necessary showing to secure the search warrant.

¹ Statutory references are to the Evidence Code unless otherwise stated.

The defendant moved to disclose the identity of the confidential informant. After conducting an in camera hearing in which Officer Shank testified, the court granted the motion for disclosure stating that it felt that the informant was a percipient and material witness who could give relevant information with respect to the guilt or innocence on the charges alleged in count 2 and the gang enhancement allegation in count 1.

DISCUSSION

Section 1041 permits a public entity to refuse to disclose the identity of an informant who has furnished information in confidence to a law enforcement officer. Disclosure of the informant's identity may be required if he or she is a material witness in the case.

An informant is a material witness under section 1041 if it appears there is a reasonable possibility the informant could give evidence on the issue of guilt which might result in a defendant's exoneration. (*People v. Wilks* (1978) 21 Cal.3d 460, 468-469, superseded on another point in *People v. Levell* (1988) 201 Cal.App.3d 749, 751-752.) An informant is not a material witness when “ ‘he simply points the finger of suspicion toward a person who has violated the law.’ ” (*Wilks*, at p. 469.) In addition, the defendant's showing must reach at least the “ ‘low plateau of reasonable possibility’ ” and cannot be based on pure speculation. (*People v. Luera* (2001) 86 Cal.App.4th 513, 525-526.)

We review the trial court's ruling concerning the disclosure of the identity of a confidential informant under the abuse of discretion standard. (*Davis v. Superior*

Court (2010) 186 Cal.App.4th 1272, 1277.) We must conclude that the trial court did abuse its discretion in ordering disclosure in this case.

The People contend that defense counsel's declaration in support of the disclosure motion was insufficient and that the trial court should have denied the motion outright. (*People v. Oppel* (1990) 222 Cal.App.3d 1146, 1153.) Even assuming that position is well taken, the trial court did conduct an in camera and it did so at the People's request. Therefore, we have reviewed the transcript of that hearing and have considered the entire record in reaching our decision. There is no evidence that indicates that the confidential informant has any evidence on the issue of guilt that might result in the defendant's exoneration of either the substantive charge or the enhancement allegation. While, as the trial court observed, the informant may have some relevant information, this is not the standard for disclosure. The evidence does not even reach the "low plateau of reasonable possibility," and disclosure cannot be justified based on the mere speculation that the informant might give exonerating evidence on defendant's behalf.

DISPOSITION

Let a peremptory writ of mandate issue directing the Superior Court of San Bernardino County to vacate its order granting the defendant's motion to disclose the identity of the confidential informant and to enter a new order denying this motion.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

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KING
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.